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No. 08-598

IN THE
SUPREME COURT OF THE UNITED STATES

David Bobby, Warden,
Petitioner,
v.

Michael Bies,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

RESPONDENT'S STATEMENT OF THE CASE . . 1

I. The trial evidence, prosecutor's concessions and state courts' findings of mental retardation 1

A. Trial and direct appeal 1

B. State post-conviction proceedings prior to *Atkins* 3

II. The State's reversal of course in response to *Atkins* 4

III. Federal habeas corpus proceedings 5

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. Bies' claim fits within the collateral estoppel rule articulated in *Ashe* 11

A. The rule of *Ashe* 11

B. The collateral estoppel rule recognized in *Ashe* does not require the sort of formal acquittal

upon which the Warden insists 12

C. Application of *Ashe*'s collateral estoppel rule is not limited to a distinct, successive prosecution 16

II. The Ohio courts made findings of mental retardation to which *Ashe*'s collateral estoppel rule applies 18

III. None of the Warden's theories for avoiding the effect of the state courts' findings (or the State's own concessions) can be sustained 23

A. The Warden's claim that mental retardation for mitigation and *Atkins* "are not the same" 23

B. The Warden's claim that the mental retardation findings were "not necessary" to the state courts' decisions 27

C. The Warden's claim that the State did not have a "full and fair" opportunity to litigate mental retardation prior to *Atkins* 29

CONCLUSION 35

TABLE OF AUTHORITIES

FEDERAL CASES

Ashe v. Swenson,
397 U.S. 436 (1970) . . . . . *passim*

Atkins v. Virginia,
536 U.S. 304 (2002) . . . . . *passim*

Benton v. Maryland,
395 U.S. 784 (1969) 11

Breed v. Jones,
421 U.S. 519 (1975) 16

Clark v. Quarterman,
457 F.3d 441 (5th Cir. 2006) 23

Clemons v. Mississippi,
494 U.S. 738 (1990) 19, 20, 28

Comm'r of Internal Revenue v. Sunnen,
333 U.S. 591 (1948) 25

Frank v. Mangum,
237 U.S. 309 (1915) 15

Harris v. Washington,
404 U.S. 55 (1971) 9, 12, 29, 30

In re Gault,
387 U.S. 1 (1967) 17

Last Chance Min. Co. v. Tyler Min. Co.,
157 U.S. 683 (1895) 30

Mackey v. United States,
401 U.S. 667 (1971) 17

Montana v. United States,
440 U.S. 147 (1979) 25, 26

New Hampshire v. Maine,
532 U.S. 742 (2001) 33

Parker v. Dugger,
498 U.S. 308 (1991) 20, 21, 28

Penry v. Lynaugh,
492 U.S. 307 (1989) . . . . . *passim*

Sealfon v. United States,
332 U.S. 575 (1948) 13

Smith v. Kemp,
664 F. Supp. 500 (M.D. Ga. 1987) 31

Sochor v. Florida,
504 U.S. 527 (1992) 21, 26

Southern Pacific Railroad Co. v. United States,
168 U.S. 1 (1897) 15, 30

Teague v. Lane,
489 U.S. 288 (1989) 17

United States v. McCaskey,
9 F.3d 368 (5th Cir. 1993) 33

United States v. Oppenheimer,
242 U.S. 85 (1916) . . . . . 12, 14 ,15

United States v. Stauffer Chemical Co.,
464 U.S. 165 (1984) 26

Zedner v. United States,
547 U.S. 489 (2006) 33

STATE CASES

Reddix v. State,
547 So.2d 792 (Miss. 1989) 31

State v. Bies,1994 Ohio App. LEXIS
1304 (Ohio Ct. App. March 30, 1994) 2

State v. Bies,
658 N.E.2d 754 (Ohio 1996) 2, 19, 21, 27

State v. Bies, 1999 WL 445692
(Ohio App. 1d June 30, 1999) 21

State v. Bies,
719 N.E.2d 4 (Ohio 1999) 22

State v. Claytor,
574 N.E.2d 472 (Ohio 1991) 1, 30

State v. Combs,
581 N.E.2d 1071 (Ohio 1991) 20

State v. Gumm,
864 N.E.2d 133 (Ohio App. 1d 2006) 23

State v. Landrum,
559 N.E.2d 710 (Ohio 1990) 20

State v. Lorraine, 2005 Ohio App.
LEXIS 2394 (Ohio Ct. App. May 20, 2005) . 34

State v. Lott,
555 N.E.2d 293 (Ohio 1990) 21

State v. Lott,
779 N.E.2d 1011 (Ohio 2002) . . . . . *passim*

State v. Lundgren,
653 N.E.2d 304 (Ohio 1995) 19

State v. Rossiter,
623 N.E.2d 645 (Ohio 1993) 31

State v. Stokes,
352 S.E.2d 653 (N.C. 1987) 31

STATUTES

28 U.S.C. § 2254(d)(1) 10

28 U.S.C. § 2254(d)(2) 6

Ohio Rev. Code § 2929.04 1

Ohio Rev. Code § 2929.05 . . . . . 1, 19, 20, 27

MISCELLANEOUS

H.B. 342,
119th Gen. Assem. (Ohio 1991-92) 33

H.B. 253,
120th Gen. Assem. (Ohio 1993-94) 33

RESTATEMENT (SECOND) OF JUDGMENTS
§ 28 cmt. c (1982) 26

Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*,
98 COLUM. L. REV. 1538 (1998) 30

RESPONDENT'S STATEMENT OF THE CASE

I. The trial evidence, prosecutor's concessions and state courts' findings of mental retardation.

A. Trial and direct appeal.

At Michael Bies' trial, Dr. Donna Winter, the court's independent expert, using the generally accepted clinical definition of mental retardation, testified without contradiction that Bies was mentally retarded. The proof was such that even the Hamilton County prosecutor conceded in closing argument that Bies' "IQ ... [is] 68 … Michael Bies is not intelligent. I think that we can all accept that." J.A. 66.

On direct appeal, the issue of Bies' mental retardation was briefed by the State and by Bies' counsel. Its importance for sentencing review was the direct consequence of Ohio's capital-sentencing law, which required the appellate courts in death cases to "review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate."[1] Both the Ohio

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[1]Ohio Rev. Code § 2929.05. *See also* Ohio Rev. Code § 2929.04(B) (enumerating aggravating and mitigating factors); *State v. Claytor*, 574 N.E.2d 472, 481 (Ohio 1991) ("The mitigating

Court of Appeals and the Ohio Supreme Court made independent findings that Bies was mentally retarded. In its independent review of the record, the Ohio Court of Appeals concluded that

> Bies' psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation; (2) a chronic and severe personality disorder characterized by emotional instability, impulsivity and problems with appropriate control of anger; and (3) probable organic brain dysfunction characterized by specific learning disabilities . . . [and] are entitled to some weight in mitigation.

State v. Bies, 1994 Ohio App. LEXIS 1304, at *28 (Ohio Ct. App. March 30, 1994); J.A. 106. The Ohio Supreme Court in turn found that "Bies' personality disorder and mild to borderline mental retardation merit some weight in mitigation."[2] *State v. Bies*, 658 N.E.2d 754,

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factor involving Claytor's undisputed mental illness and the impact it had on his reasoning process should have been accorded more weight.").

[2]Both of these findings of mental retardation were made before the Ohio Supreme Court responded to *Atkins v. Virginia*, 536 U.S. 304 (2002), by formally adopting a standard for mental retardation in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). However, the Warden does not seriously dispute that Dr. Winter's pre-trial mental retardation diagnosis was rendered using the standard later adopted in *Lott*. *See* Petition for Writ of Certiorari at 26 ("This reasoning improperly assumes that because Dr.

761 (Ohio 1996).

B. State post-conviction proceedings prior to *Atkins*.

After the Ohio Supreme Court decided his case on direct appeal, Bies filed his first petition for state post-conviction relief. That petition included a claim that the execution of a mentally retarded person would constitute cruel and unusual punishment in violation of both the United States and Ohio Constitutions. J.A. 128-29. The petition further alleged that a new national consensus had developed since *Penry v. Lynaugh*, 492 U.S. 307 (1989), barring the execution of persons with mental retardation. J.A. 128. In response, the State conceded that "[t]he record reveals defendant to be mildly mentally retarded with an IQ of about 69," but asserted that relief should be denied because there was no legal prohibition against executing a person with mental retardation. J.A. 144.

The state post-conviction court's findings and conclusions mirrored the positions taken by the State:

> The defendant's fifth claim for relief is that it is cruel and unusual punishment to execute a retarded person. As to this claim, the Court makes the following Findings of Fact: (1) The defendant is shown by the record to be mildly mentally

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Winter applied the diagnostic method that was later outlined in *Lott* ....").

> retarded with an IQ of about 69. The Court makes the following Conclusions of Law: As a matter of law, a mildly mentally retarded defendant may be Punished [sic] by execution.

J.A. 153.[3]

On appeal from the denial of post-conviction relief, the State twice again conceded that Bies was mentally retarded. J.A. 160 (in the Ohio Court of Appeals); 184 (in the Ohio Supreme Court).

II. The State's reversal of course in response to *Atkins*.

This Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), was handed down while Bies' second petition for post-conviction relief was pending in state court,[4] and his petition for federal habeas corpus relief was pending in the United States District Court for the Southern District of Ohio. Relying on *Atkins*, Bies returned to state court with a third petition for post-

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[3]The state post-conviction petition also included a claim that trial counsel was ineffective for failing to challenge Bies' confession on the basis of his mental retardation. While the court rejected the claim on the basis that Bies' "degree of retardation is not such that would not cause suppression," it made the factual finding that "defendant is mildly mentally retarded ...." J.A. 148.

[4]The claims raised in this second petition for state post-conviction relief were not related to the issues now before this Court.

conviction relief, again asserting that his execution would violate the Eighth Amendment because he is mentally retarded, and adding that the State was collaterally estopped from relitigating the factual issue of his mental retardation. J.A. 241-42.

Ignoring its own earlier concessions and the multiple state court findings of retardation, the State responded to the *Atkins* claim with the contention that "Bies' I.Q. score coupled with his adaptive behavior skills indicate that he is not mentally retarded." *See, e.g.*, Pl. Mem. in Opp'n to Def. Mot. For Summ. J., State of Ohio, Hamilton County, at 5 (Sept. 8, 2003). In response to Bies' estoppel argument, the State contended that the issue of Bies' mental retardation should be re-examined at an evidentiary hearing pursuant to the procedure outlined by the Ohio Supreme Court's decision in *Lott*. *Id.* Citing an inability "to determine whether the experts applied the test [for mental retardation] as laid out by the courts" in *Atkins* and *Lott*, the state post-conviction court denied Bies' motion for summary judgment. Pet. App. 102a.

III. Federal habeas corpus proceedings.

Bies returned to federal court challenging the state post-conviction court's determination that the factual question of his mental retardation could (and should) be relitigated. Applying the rule established by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), the Magistrate Judge recommended that the writ be granted because the prior findings of mental

retardation constituted determinations of an "ultimate fact" barring further litigation, and because the state court's decision to the contrary was factually and legally unreasonable under *Ashe*. Pet. App. 75a; *see also id.* at 77-78a (observing that, in light of three prior state court findings that Bies is mentally retarded, the "new procedures for determining mental retardation ... [were] immaterial"). The District Court adopted the Magistrate's Report and Recommendation. Pet. App. 67-68a.

On appeal by the Warden, the Sixth Circuit agreed with the district court's determination that relitigation of the settled fact of Bies' mental retardation was barred under *Ashe*'s rule that, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Pet. App. 45a (quoting *Ashe*, 397 U.S. at 443). The Sixth Circuit supported this conclusion with a detailed analysis of the record developed at trial, the arguments asserted by the parties on direct appeal, the review undertaken and the findings rendered by the Ohio courts on direct appeal, and the standard for establishing mental retardation as applied by Dr. Winter prior to trial and later adopted by the Ohio Supreme Court in *Lott*. Pet. App. 45-62a.

Having determined that the Double Jeopardy Clause barred further litigation of Bies' mental retardation, the Sixth Circuit went on to conclude that habeas relief was authorized under 28 U.S.C. § 2254(d)(2) because "[c]lear and convincing evidence ...

demonstrate[s] that the Ohio state court based its decision to permit relitigation of [Bies'] mental retardation on *unreasonable determinations of fact*." Pet. App. 62a (emphasis added). The court explained that the state post-conviction court's claims of uncertainty about whether Dr. Winter had applied the mental retardation standard later adopted in *Lott* were "contrary to the record" because the record clearly showed that *Lott* had adopted the clinical test accepted by the psychological profession and that Dr. Winter had applied that test herself. Pet. App. 62-65a; *see also id.* at 342 ("In light of the overwhelming evidence that Dr. Winter did in fact apply the clinical standard recognized by her own profession, we conclude that clear and convincing evidence demonstrates that the Ohio trial court unreasonably found that Dr. Winter could have applied a different standard."). "Accordingly," the Sixth Circuit held, Bies' "double jeopardy rights are being violated pursuant to a state court decision that is based on unreasonable determinations of fact." *Id.* at 65a.

The Warden sought rehearing *en banc*, which was denied over Judge Sutton's dissent.[5] The Warden filed a petition for writ of certiorari in this Court, which was granted on January 16, 2009.

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[5]In his dissent from the denial of rehearing *en banc*, Judge Sutton acknowledged that Bies has an IQ of 69 and that "two licensed clinical psychologists have concluded he is mentally retarded." Pet. App. 31a. He further observed that Bies is "mildly mentally retarded," and that "Bies' I.Q. places him within the category of individuals the Court recognized might be affected by [*Atkins*]." *Id.*

SUMMARY OF ARGUMENT

This case is governed by *Ashe v. Swenson*, 397 U.S. 436 (1970), where this Court held that the "established [collateral estoppel] rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy." *Id*. at 445. As articulated in *Ashe*, "'[c]ollateral estoppel' ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id*. at 443.

While factual determinations implicating the collateral estoppel rule in criminal cases are, as a practical matter, most likely to be produced by a jury's or court's judgment of acquittal, nothing in *Ashe* or the substantial body of decisions upon which it relies establishes a formal acquittal as a precondition to the applicability of collateral estoppel. Likewise, while collateral estoppel is most likely to be invoked in a criminal case in response to a successive prosecution, *Ashe*'s preclusion of relitigation "in any future lawsuit" is not confined to such narrow circumstances. Rather, *Ashe*'s rule, which must be applied with "realism and rationality," *id.* at 444, easily accommodates cases, such as this one, necessitating enforcement of a new, retroactive rule of substantive law in a proceeding other than a successive prosecution.

The Ohio courts made multiple findings that Bies is mentally retarded. On direct appeal, both the Ohio Court of Appeals and the Ohio Supreme Court

made mental retardation findings as part of the independent review and reweighing mandated by state law and the Eighth Amendment. And in subsequent state post-conviction relief proceedings, the State conceded, and the Hamilton County Court of Common Pleas twice found, that Bies is "mildly mentally retarded ...." J.A. 148; 153. The State then repeated its concession in response to Bies' appeals to the Ohio Court of Appeals and the Ohio Supreme Court.

Contrary to the Warden's arguments, it is inconsequential that the series of findings and concessions concerning Bies' mental retardation occurred prior to this Court's decision in *Atkins*. This is so because the standard utilized by Dr. Winter at the time of Bies' trial was the same as the standard later adopted by the Ohio Supreme Court in the aftermath of *Atkins*. And while the legal consequences which attach to the factual determinations that Bies is mentally retarded certainly changed with *Atkins*, this Court's decisions make clear that such a change does not render collateral estoppel inapplicable.

Finally, the Warden's assertion that the State lacked a full and fair opportunity to litigate Bies' mental retardation prior to *Atkins* is both legally irrelevant and factually unsustainable. As illustrated in *Harris v. Washington*, 404 U.S. 55 (1971), the possibility that a party may produce additional evidence relevant to a previously determined factual issue is not a basis for withholding application of collateral estoppel with respect to the prior determination. Furthermore, the suggestion that Ohio

prosecutors lacked incentives to aggressively litigate mental retardation prior to *Atkins* is factually unsound. Long before *Atkins*, mental retardation was widely recognized as a powerful mitigating circumstance, and it was directly relevant, *inter alia*, to the balancing of aggravating and mitigating circumstances undertaken by the state courts in Bies' case. Additionally, given this Court's remarks in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and the ensuing national trend toward exempting individuals with mental retardation from the death penalty, it was hardly unforeseeable to prosecutors in Bies' case that such an exemption would reach Ohio.

ARGUMENT

Two of the three Questions Presented by the Warden contain express invocations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), coupled with suggestions that the Sixth Circuit's decision below conflicted with the "clearly established federal law" clause of 28 U.S.C. § 2254(d)(1). *See* Pet. Br. i (Questions 1 and 3). However, as demonstrated by the lack of attention to AEDPA in the Warden's brief, and by the face of the Sixth Circuit's opinion, this is not a § 2254(d)(1) case at all. Rather, what the Warden now presents to this Court is simply a request that the Court correct a purported error in the Sixth Circuit's application of settled Double Jeopardy principles to the admittedly idiosyncratic factual circumstances of this unique record.

While the factual situation in this case is indeed unusual, the governing rule of decision is not. That rule was articulated by this Court nearly forty years ago in *Ashe v. Swenson*, 397 U.S. 436 (1970), and Bies requires no more than application of the plain language of *Ashe*'s rule in order to prevail on his collateral estoppel argument.

I. Bies' claim fits within the collateral estoppel rule articulated in *Ashe*.

A. The rule of *Ashe*.

In *Ashe v. Swenson*, this Court defined collateral estoppel as "mean[ing] simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443.

The issue in *Ashe* was whether this "extremely important principle" "is a part of the Fifth Amendment's guarantee against double jeopardy."[6] *Id.* at 442, 443. While pre-*Benton* decisions had effectively prevented the development of a uniform constitutional rule of collateral estoppel applicable to state criminal cases, the same was not true on the federal side. On

[6]This question remained open until 1970 because, prior to *Benton v. Maryland*, 395 U.S. 784 (1969), the Double Jeopardy Clause had not been held to be applicable to the States. Before *Benton* and *Ashe*, application of collateral estoppel was "a matter to be left for state court determination within the broad bounds of 'fundamental fairness' ...." *Ashe*, 397 U.S. at 442-43.

the contrary, "collateral estoppel ha[d] been an established rule of federal criminal law at least since [the] decision ... in *United States v. Oppenheimer*, 242 U.S. 85 [(1916).]" *Id.* at 443; *see also id.* (quoting Mr. Justice Holmes in *Oppenheimer*, 242 U.S. at 87) ("'It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.'").

Having recognized the existence of a substantial body of "federal decisions" applying a well-developed "federal rule" of collateral estoppel, this Court framed the "ultimate question to be determined" in *Ashe* as "whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy." *Id.* at 445. The Court answered this question emphatically: "We do not hesitate to hold that it is." *Id.*; *see also Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) ("In *Ashe v. Swenson*, ... we held that collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments.").

B. The collateral estoppel rule recognized in *Ashe* does not require the sort of formal acquittal upon which the Warden insists.

The Warden asserts that collateral estoppel is inapplicable in this case because no formal "acquittal" has been entered for Bies by a judge or jury. *See* Pet.

Br. 12-23. This view is inconsistent with *Ashe* and with the "established rule of federal law"which *Ashe* held to be "embodied in the Fifth Amendment guarantee against double jeopardy."

In collateral estoppel doctrine, as distinguished from the doctrines of *autrefois convict* and *autrefois acquit*, a judgment of acquittal or other verdict is not significant in its own right; it is significant only because it constitutes "a determination favorable to ... [the defendant] of the facts essential" to an issue which the prior proceeding was required to resolve. *Sealfon v. United States*, 332 U.S. 575, 578 (1948). This is reflected in *Ashe*'s articulation of the collateral estoppel rule as applicable "when an issue of ultimate fact has once been determined by a valid and final judgment." While, as a practical matter, a factual determination meeting this description in a criminal case is most likely to be made as part of a jury's or trial court's judgment of acquittal, that likelihood is merely a function of the ordinary allocation of fact-finding responsibilities in American criminal procedure, not a requirement of the collateral estoppel doctrine. Rather, as *Ashe*'s plain language makes clear, "a valid and final judgment" is all that is required to trigger collateral estoppel, regardless of whether that judgment takes the precise form of an "acquittal."

Moreover, as this Court noted in *Ashe*, "[t]he federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and

rationality." *Ashe*, 397 U.S. at 444. This emphasis on pragmatism over formality is illustrated in *United States v. Oppenheimer*, cited in *Ashe* as a leading example of the "established rule of federal law ... embodied" in the Double Jeopardy Clause. In *Oppenheimer*, this Court upheld a defendant's plea that a second attempt to prosecute him was precluded by collateral estoppel, not because he had been acquitted of the charged offense by a judge or jury (he had not), but because an earlier attempt to prosecute him had been found time-barred under the applicable statute of limitations. While this Court termed the trial court's judgment an "acquittal," it plainly defined that term more broadly than the Warden's present argument envisages:

> It cannot be that a judgment of acquittal on the ground of the statute of limitations is less a protection against a second trial than a judgment upon the ground of innocence, or that such a judgment is any more effective when entered after a verdict than if entered by the government's consent before a jury is empaneled; or that it is conclusive if entered upon the general issue (...), but if upon a special plea of the statute, permits the defendant to be prosecuted again. We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words.

Oppenheimer, 242 U.S. at 87.

This Court has also applied collateral estoppel to a factual determination by a state appellate court in a criminal case. In *Frank v. Mangum*, 237 U.S. 309 (1915) – another of the decisions cited by *Ashe* as examples of the collateral estoppel rule "embodied in the Fifth Amendment guarantee against double jeopardy," *Ashe*, 397 U.S. at 443 n.7 – this Court explained:

> [N]o doubt is suggested but that the [Georgia] supreme court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; ... It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.

Frank, 237 U.S. at 333-34 (citing *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 48 (1897)).

C. Application of *Ashe*'s collateral estoppel rule is not limited to a distinct, successive prosecution.

The Warden also argues that the collateral estoppel rule embraced by *Ashe* applies "only when the government seeks to re-prosecute or re-punish," and that no such effort was made by the State of Ohio during the state post-conviction proceeding underlying this case. *See* Pet. Brf. 27-32. Once again, the Warden's argument is at odds with *Ashe*.

The rule *Ashe* recognized as "embodied in the Fifth Amendment guarantee against double jeopardy" is that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties *in any future lawsuit*." *Ashe*, 397 U.S. at 443 (emphasis added). It is true that this rule is most likely to be implicated in a criminal case by a second or subsequent prosecution. But there is no principled reason not to give effect to the plain meaning of the rule *Ashe* articulated in the rare criminal case where the need for estoppel arises in a "future lawsuit" that does not take the form of a successive prosecution. *See id.* at 444 (collateral estoppel should be applied with "realism and rationality").[7]

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[7] *See also Breed v. Jones*, 421 U.S. 519, 529 (1975) ("We believe it is simply too late in the day to conclude ... that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and

This is one of those rare cases. In *Atkins v. Virginia*, this Court took the highly unusual step of announcing a new, retroactive rule of substantive law rendering a class of individuals categorically ineligible for a death sentence. *See Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) ("[I]f we held ... that the Eighth Amendment prohibits the execution of mentally retarded persons ..., such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review."). Implicit in the announcement of the *Atkins* rule was a judgment that, with regard to prisoners covered by the rule, states' interests in finality and protection of settled expectations would be overridden. *See Teague v. Lane*, 489 U.S. 288, 308-10 (1989); *Mackey v. United States*, 401 U.S. 667, 693 (1971) (opinion of Harlan, J., concurring in judgments in part and dissenting in part) ("New 'substantive due process' rules ... must ... be placed on a different footing. ... There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). Multiple findings of mental retardation by the Ohio courts (as well as concessions by the State) place Bies within the class

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whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the "civil" label-of-convenience which has been attached to juvenile proceedings,' and that 'the juvenile process ... be candidly appraised.'") (footnote omitted) (quoting *In re Gault*, 387 U.S. 1, 50, 21 (1967)).

retroactively covered by *Atkins*. Adherence to the "realism and rationality" prescribed by *Ashe* dictates that the Warden should be estopped from further litigation of the fact of Bies' mental retardation.[8]

II. The Ohio courts made findings of mental retardation to which *Ashe*'s collateral estoppel rule applies.

As described above, collateral estoppel applies "when an issue of ultimate fact has once been determined by a valid and final judgment ..." *Ashe*, 397 U.S. at 443. In this case, the "fact" of Bies' mental retardation has been determined in valid and final judgments by no fewer than three Ohio state courts. First, on direct appeal the Ohio Court of Appeals found that "Bies' psychological difficulties revolved around: (1) mild mental retardation to borderline mental retardation ...." J.A. 106. Second, and also on direct appeal, the Ohio Supreme Court found that "Bies' personality disorder and mild to borderline mental

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[8]The Warden's argument that "[t]he civil post-conviction remedy that Bies initiated does not put him in 'jeopardy,'" Pet. Br. 24, misses the point. At the time Bies raised his *Atkins* claim in the state post-conviction court, he already had in hand multiple state court findings that he is a member of a class ineligible for a sentence of death. His state post-conviction petition should therefore have resulted in a simple formalization of what had already been established in fact: that Bies is mentally retarded and his death sentence cannot stand. Instead, the State created the threat of further jeopardy by defying the previous findings (and its own concessions) and insisting that the question of Bies' mental retardation – and consequently his eligibility for a death sentence – be reopened.

retardation merit some weight in mitigation." *State v. Bies*, 658 N.E.2d 754, 761 (Ohio 1996). And third, the Hamilton County Court of Common Pleas twice stated in its July 22, 1998 order denying Bies' first petition for state post-conviction relief that Bies was "mildly mentally retarded." J.A. 148, 153.

The findings made on direct appeal by the Ohio Court of Appeals and the Ohio Supreme Court were essential to those courts' discharge of their direct review responsibilities under state law and the federal Constitution. State law required that the state appellate courts

> review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate.

Ohio Rev. Code § 2929.05.

This statutory mandate has long been regarded by Ohio courts as identical to the independent appellate review prescribed by this Court in *Clemons v. Mississippi*, 494 U.S. 738 (1990), and its progeny. *See*, *e.g.*, *State v. Lundgren*, 653 N.E.2d 304, 323 (Ohio 1995) (stating that "[t]his court's independent assessment pursuant to R.C. 2929.05 eliminates the

effect of any error," and citing *Clemons*); *State v. Combs*, 581 N.E.2d 1071, 1079 (Ohio 1991) (referring to *Clemons* and adding that "R.C. 2929.05 mandates such an independent reweighing in both the court of appeals and this court"); *State v. Landrum*, 559 N.E.2d 710, 729 (Ohio 1990) (citing *Clemons* and *Lott*) ("We have independently reviewed and weighed the evidence as required by R.C. 2929.05(A). In doing so, we have rectified any errors ... that might have affected the weighing of the aggravating circumstance against mitigating factors, or the fundamental fairness and appropriateness of the death penalty determination."). As this Court has repeatedly made plain, a state appellate court performing this function must independently assess the evidence and render the subsidiary findings necessary to a genuine, individualized weighing of aggravating and mitigating circumstances. *See Clemons*, 494 U.S. at 749 ("[S]tate appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime."); *Parker v. Dugger*, 498 U.S. 308, 321 (1991) ("It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record.").

The review of Bies' sentence by the Ohio Court of Appeals and the Ohio Supreme Court was conducted according to § 2929.05 and this Court's decisions. Both state appellate courts expressly indicated that they were undertaking to "independently review" the evidence for the purpose of reweighing. J.A. 104 (Ohio

Court of Appeals) ("[W]e now independently review and weigh the facts and the other evidence disclosed in the record to determine whether the aggravating circumstances outweigh the mitigating factors, if any, demonstrated in the record in accordance with R.C. 2929.05(A)"); *State v. Bies*, 658 N.E.2d at 761 ("Pursuant to our duties imposed by R.C. 2929.05(A), we now independently review the death penalty sentence for appropriateness and proportionality."); *see also* J.A. 146 (Ohio Court of Common Pleas) ("Any error in the sentencing process was corrected by the de novo review by the Court of Appeals and the Ohio Supreme Court. *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441 (1990)."). Furthermore, the Ohio Supreme Court unquestionably assumed the obligation under *Clemons* to make independent findings with regard to each mitigating factor when it declined to review Bies' challenges to the trial judge's sentencing order on the explicit ground that "even if any of Bies' complaints are valid, our independent review will cure any errors or omissions." *State v. Bies*, 658 N.E.2d at 760 (citing *State v. Lott*, 555 N.E.2d 293, 304 (1990) (citing, in turn, *Clemons*));[9] *see also State v. Bies*, 1999 WL 445692 (Ohio App. 1d June 30, 1999) ("Further, any error in the consideration of [a challenged]

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[9]Because the Ohio Supreme Court relied upon its own independent finding and weighing of mitigating circumstances against aggravating circumstances to justify pretermitting review of the trial judge's sentencing order, it was obliged by the Eighth Amendment as well as by Ohio law to make factual findings of the existence *vel non* of each mitigating circumstance, as a precondition to a valid weighing process. See *Parker*, 498 U.S. at 318-320; *Sochor v. Florida*, 504 U.S. 527, 538-40 (1992).

document would have been corrected by the *de novo* review of the sentence by this court and the Ohio Supreme Court.") (citing *Clemons* and *Lott*). Thus, the Ohio appellate courts not only made findings on the question of Bies' mental retardation, they made those findings after independent review of the evidence, and for the express purpose of weighing the sum of the individual mitigating factors against the sum of the individual factors in aggravation.

Finally, in addition to the findings made on direct appeal, the Hamilton County Court of Common Pleas' order denying post-conviction relief twice stated that court's conclusion that Bies was "mildly mentally retarded." J.A. 148, 153. The second of these findings was made in connection with Bies' pre-*Atkins* claim that "it is cruel and unusual punishment to execute a retarded person," J.A. 153, to which the State had responded in part by conceding that "[t]he record reveals defendant to be mildly mentally retarded with an I.Q. of about 69," J.A. 143. The State repeated this concession in its subsequent submissions to the Ohio Court of Appeals, J.A. 160, and the Ohio Supreme Court, J.A. 184.[10]

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[10]The Ohio Court of Appeals declined to consider Bies' post-conviction categorical ineligibility claim on state procedural grounds, J.A. 175-76, and the Ohio Supreme Court denied Bies' request for discretionary review, *State v. Bies*, 719 N.E.2d 4 (Ohio 1999).

III. None of the Warden's theories for avoiding the effect of the state courts' findings (or the State's own concessions) can be sustained.

A. The Warden's claim that mental retardation for mitigation and *Atkins* "are not the same."

The Warden argues that "mental retardation for purposes of mitigation" and "mental retardation for purposes of *Atkins* ... are not the same ... because *Atkins* fundamentally changed the applicable law," and that "[t]he Ohio Supreme Court therefore did not actually resolve the second question when it decided the first." Pet. Brf. 32-33; *see also* Pet. Brf. 34 ("The Ohio Supreme Court could not have decided the *Atkins* issue before there was an *Atkins* issue to decide."). This argument goes wrong from the start by conflating the factual question of whether Bies is mentally retarded with the legal question of how his mental retardation affects his eligibility for a death sentence.

Whether a person suffers from mental retardation is a question of fact. *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) ("Whether Lott is mentally retarded is a disputed factual issue, which we believe is best resolved in the trial court"); *State v. Gumm*, 864 N.E.2d 133, 139 (Ohio App. 1d 2006) ("The determination of whether a capital defendant is, by the *Lott* court's definition, mentally retarded presents a factual issue for the trial court."); *see also*, *e.g.*, *Clark*

v. Quarterman, 457 F.3d 441, 444 (5th Cir. 2006) ("We agree ... that the question of whether [petitioner] suffers from significantly subaverage intellectual functioning is a question of fact, and not a mixed question of law and fact ...."). While the Warden emphasizes that *Atkins* led to the creation of new procedures and substantive rules for determining the existence of mental retardation as a bar to a death sentence, *see* Pet. Br. 36-42, he does not seriously contest the Sixth Circuit's determination that the factual condition constituting mental retardation in Ohio did not change after *Atkins*. This is as it must be, for as the Sixth Circuit correctly found, the clinical definition of mental retardation adopted by the Ohio Supreme Court in *Lott* is the same as the definition applied by Dr. Winter at the time of Bies' trial. Pet. App. 51a-53a.

The Sixth Circuit further held that the "Ohio trial court's determination that Dr. Winter may not have applied the clinical definition of mental retardation was based on 'an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. § 2254(d)(2).'" Pet. App. 65a. The Warden has effectively conceded this point (Petition for Writ of Certiorari, at 26) and does not identify any record support for the state post-conviction court's agnostic conclusion that the trial court's chosen independent expert witness "may not" have used the then-prevailing and unmistakably clear clinical standards of her profession in making her diagnosis. Rather, the Warden's real challenge to Dr. Winter's diagnosis is that *Atkins* changed the legal

consequences which attach to the state courts' factual findings and the State's own concessions based on that diagnosis prior to *Atkins*. Relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), the Warden contends that this change in legal consequences renders the collateral estoppel rule of *Ashe* inapplicable. However, neither the text nor the logic of *Sunnen* applies in this case.

Sunnen stands for the proposition that collateral estoppel does not apply to a *legal* ruling if there has been a major change in law that renders the previous adjudication inconsistent with prevailing doctrine. *See Montana v. United States*, 440 U.S. 147, 161 (1979). The issue in *Sunnen* was whether royalties paid to a shareholder that a court once determined to be non-taxable income were thus forever non-taxable income despite a change in the applicable legal standard. *Sunnen*, 333 U.S. at 596-97. This Court held that issue preclusion did not apply "*in these circumstances*" because the legal matter did not involve the "same bundle of legal principles that *contributed to* the rendering of the first judgment." *Id.* at 602 (emphasis added). The Court reasoned that a contrary rule would cause inequitable administration of the laws:

> [A] change or development in the controlling legal principles may make [the past] determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is

> accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws[.]

Id. at 599; *Montana*, 440 U.S. at 161 (quoting this language as the driving logic in *Sunnen*); *see also United States v. Stauffer Chemical Co.*, 464 U.S. 165, 180 (1984) (noting that *Sunnen* was concerned with avoiding "preferential treatment"); *cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. c (grounding *Sunnen* rule in avoidance of "inequitable administration of the laws").

Although this Court's decision in *Atkins* undeniably changed the law, that change in law is entirely irrelevant to whether Bies is in fact mentally retarded. *Sunnen*, as characterized in *Montana*, requires that the change in law be "of controlling significance" to the issue in the first proceeding. *Montana*, 440 U.S. at 160. The pre-*Atkins* rule that the state could execute mentally retarded people was not even relevant to, let alone "controlling" of, whether Bies is mentally retarded. *Atkins* changed the *legal* consequences of that *factual* finding, but it is only the factual finding which Bies relies upon as the basis for estoppel.

Moreover, the logic of *Sunnen* does not apply to this case. The respondent in *Sunnen* asked to benefit from a defunct legal standard. Had the Court applied that standard, it would have applied a different legal

rule to the respondent than would apply to other similarly situated parties. By contrast, Bies does not ask to benefit from a legal standard unavailable to similarly situated parties; rather, he seeks only to benefit from the *present* legal standard of *Atkins*. Because the *facts* underlying the past factual finding have not changed, *Sunnen* is inapplicable.

B. The Warden's claim that the mental retardation findings were "not necessary" to the state courts' decisions.

The Warden next argues that collateral estoppel is inapplicable in this case "because a finding regarding Bies' mental retardation was not necessary to the Ohio Supreme Court's decision on direct review."[11] Pet. Br. at 42. This is so, the Warden contends, because although "state law required that the Ohio Supreme Court independently assess the appropriateness of the death penalty and weigh the aggravating and mitigating circumstances," *id.* at 43 (citing Ohio Rev. Code § 2929.05(A)), "the only finding that carries preclusive effect – because it is the only one on which the judgment hinges – is the final outcome of the balancing," *id.* This contention ignores the nature of the inquiry the Ohio appellate courts

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[11]As described *supra*, the Ohio Supreme Court was only one of three state courts to make factual determinations that Bies is mentally retarded. This portion of the Warden's brief does not address the other two. The Warden also omits the State's three express concessions of the fact of Bies' mental retardation during the pre-*Atkins* state post-conviction proceedings.

were required to perform when reviewing Bies' death sentence.

As discussed in part II *supra*, the Ohio Court of Appeals and the Ohio Supreme Court independently reviewed the evidence in order to reweigh the aggravating and mitigating circumstances pursuant to state and federal law. The reweighing was necessary not only as a matter of Ohio law but as a matter of federal Eighth Amendment law, since the Ohio Supreme Court relied upon reweighing to cure any errors that Bies' trial judge may have committed in weighing aggravation against mitigation. *See State v. Bies*, 658 N.E.2d at 760; *see also supra* note 9. This Court's decisions establish quite clearly that when an appellate court in a weighing state undertakes such independent review, it is constitutionally essential for that court to make findings as to the existence of individual mitigating and aggravating factors before those factors can be weighed, and the propriety of a death sentence thereby determined. *See Clemons*, 494 U.S. at 752 ("Additionally, because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence."); *Parker*, 498 U.S. at 320 ("What the Florida Supreme Court could not do ... was to ignore the evidence of mitigating circumstances in the record ... and affirm the sentence based on a mischaracterization of the trial judge's findings.").

Thus, contrary to the Warden's suggestion, the Ohio appellate courts' identification of mitigating factors – including Bies' mental retardation – was a constitutionally indispensable step in the independent reweighing those courts performed. While Bies' death sentence could have been upheld had the state courts found Bies *not* to be mentally retarded (which they did not), the presence of evidence and argument presenting the question of mental retardation obligated the courts conscientiously to decide the issue one way or the other. For that reason, the mental retardation finding was necessary.

C. The Warden's claim that the State did not have a "full and fair" opportunity to litigate mental retardation prior to *Atkins*.

The Warden maintains that collateral estoppel is not applicable because the State did not have a full and fair opportunity to litigate the issue of Bies' mental retardation prior to *Atkins*. Pet. Br. at 44-46. This argument is legally irrelevant. In *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam), the state made a similar argument in defense of the Supreme Court of Washington's determination that a second trial could go forward, despite prior resolution of an "ultimate fact" against the government, because additional evidence would be available to the prosecution. After noting the state's concession that "the ultimate issue of identity was decided by the jury in the first trial," this Court concluded that "the

constitutional guarantee [of collateral estoppel as part of the double jeopardy guarantee] applies, irrespective of whether the jury considered all relevant evidence, and irrespective of the good faith of the State in bringing successive prosecutions." *Harris*, 404 U.S. at 56-57; *see also Southern Pacific Railroad Co. v. United States*, 168 U.S. at 52 (describing *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 691 (1895)) ("The essence of estoppel by judgment being that there has been a judicial determination of a fact, ... the question always is, has there been a determination? and not, upon what evidence and by what means was it reached?").

Furthermore, even if it had any legal relevance, the Warden's argument would fail factually. It is based on the faulty premise that because *Atkins* was totally unforeseeable, the State "had little incentive to litigate the issue of a defendant's mental retardation." Pet. Br. at 45. But even prior to *Atkins*, evidence of mental retardation was widely recognized to be one of the most persuasive categories of mitigating evidence. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1564 (1998). Thus, there was the possibility that the Ohio courts would, if they concluded Bies was mentally retarded, either reach a different conclusion as to the balance of aggravating and mitigating circumstances or find the death penalty to be disproportionate. In *State v. Claytor*, 574 N.E. 2d 472, 482 (Ohio 1991), for example, the Ohio Supreme Court relied upon evidence of the defendant's mental defect in concluding: "we cannot find that the aggravating

circumstances of the crime have been shown to outweigh the mitigating factors beyond a reasonable doubt." Other jurisdictions, relying heavily on evidence of the defendant's mild mental retardation, had determined that the death penalty was a disproportionate punishment. *See, e.g., Reddix v. State*, 547 So.2d 792 (Miss. 1989); *State v. Stokes*, 352 S.E.2d 653 (N.C. 1987).

Moreover, at trial, on appeal and in state post-conviction proceedings, Bies relied heavily on his mental retardation in challenging the admissibility of an incriminating statement made to law enforcement. Courts in Ohio and in other jurisdictions had previously determined that a defendant's waiver of *Miranda* rights was not knowing and intelligent due in part to the defendant's mental retardation. *See, e.g., State v. Rossiter*, 623 N.E.2d 645, 649 (Ohio 1993); *Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1987).

Finally, at the time of Bies' direct appeal and of the state post-conviction proceedings that produced a decision finding Bies mentally retarded but rejecting his federal and state constitutional challenge to executing persons with mental retardation, it was hardly unforseeable that the Ohio Supreme Court, the Ohio legislature, or this Court would determine that the death penalty was an excessive punishment for persons with mental retardation. This Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), did not purport in any shape, fashion, or form to conclusively decide the issue. Rather, the Court decided only that there was not a consensus prohibiting the execution of

persons with mental retardation at that time. *Id.* at 340 ("But we cannot conclude *today* that the Eighth Amendment precludes the execution of any mentally retarded person.") (emphasis added). In short, *Penry* was the beginning, not the end, of a constitutional conversation about the appropriateness of the death penalty for mentally retarded persons such as Michael Bies. As such, *Penry* itself put states on clear notice that a categorical exemption from the death penalty for mentally retarded offenders could come to pass.

In the wake of *Penry*, things began to change rapidly. As this Court noted in *Atkins*, "Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue." *Atkins*, 536 U.S. at 314. In 1990, Kentucky and Tennessee barred the death penalty for mentally retarded persons; New Mexico did so in 1991; Arkansas, Colorado, Washington, Indiana and Kansas followed suit in 1993 and 1994; and when New York reinstated the death penalty in 1995, it expressly exempted persons with mental retardation. In 1998, Nebraska created a similar bar. *Id.* Thus, at the time of Bies' direct appeal in 1996 and the post-conviction proceedings initiated later that same year, the trend was unmistakable.[12] In fact, it was precisely these

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[12]Furthermore, legislation was introduced in the Ohio legislature on two occasions during this period which would have barred the execution of persons with mental retardation. In both the 199th (1991-92) and 120th (1992-94) General Assemblies, bills were introduced which would have precluded the death penalty for persons with mental retardation. *See* H.B. 342, 119th Gen. Assem.

developments which formed the basis of Bies' post-conviction challenge to his death sentence. Bies maintained that "a national consensus against executing the mentally retarded reflects the new standard of decency in the United States," and that because of this new consensus, Bies' death sentence violated both the Eighth Amendment and the Ohio Constitution. J.A. 128-29. It was in response to this claim that the State conceded and the state court expressly found that Bies was "mildly mentally retarded."[13] J.A. 153. Given these events, the State certainly had added incentives to contest the fact of

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(Ohio 1991-92); H.B. 253, 120th Gen. Assem. (Ohio 1993-94).

[13]Given the State's express concession that Bies was "mildly mentally retarded," the Warden's insistence now that the issue of mental retardation should be relitigated warrants application of judicial estoppel. These two positions are clearly irreconcilable, the State persuaded the state post-conviction court to accept its concession, and the Warden would gain an unfair advantage if he were now permitted to distance himself from that concession. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *see also*, *e.g.*, *Zedner v. United States,* 547 U.S. 489, 504 (2006) (stating that judicial estoppel prevents a party that "assumes a certain position in a legal proceeding, and succeeds in maintaining that position" from later assuming a contrary position, "simply because his interests have changed"); *United States v. McCaskey*, 9 F.3d 368 (5th Cir. 1993) (stating that judicial estoppel is designed to protect the integrity of the judicial process by "preventing internal inconsistency, precluding litigants from 'playing fast and loose' with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment").

Bies' mental retardation.[14]

[14]This is another instance of the State taking fundamentally inconsistent positions. After this Court rendered its decision in *Atkins*, several inmates challenged their death sentences on the basis of their mental retardation. In *State v. Lorraine*, 2005 Ohio App. LEXIS 2394 (Ohio Ct. App. May 20, 2005), the Warden argued that the defendant was not entitled to a hearing in connection with an *Atkins* claim because, "although mental retardation would not have automatically barred his execution in 1986, a mental retardation diagnosis could certainly have been raised as a mitigating factor." Brief of Respondent at 13, *State v. Lorraine*. In *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the Warden argued that Lott should be precluded from raising a mental retardation claim post-*Atkins* because, prior to this Court's decision, "Lott still had reasons to pursue a claim of mental retardation if it existed because ... he could have presented the argument in support of the (B)(3) mitigating factor of mental disease or defect." Brief of Respondent at 8, *State v. Lott*.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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